ASIAPOOLS (M) SDN BHD

v.

IJM CONSTRUCTION SDN BHD

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ZAINUN ALI JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: W-04-167-2006]
11 DECEMBER 2009

CONTRACT: *Building contract - Claim for work done - Completion of sub-contract works by sub-contractor - Claim for final progress payment - Developer not paid by employer - 'Pay when paid' clause present in subcontract - Whether final payment claimed by sub-contractor was subject to 'pay when paid' clause - Whether 'progress payment' includes final payment - Whether subcontractor only entitled to payment after developer was paid by employer*

CONTRACT: *Construction - Plain and literal meaning - Words to be construed according to plain and literal meaning unless understood in some technical or special sense - Court to discover mutual intention of parties from document itself - Evidence of parties' intentions at variance with provisions of contract document inadmissible - Principles of construction cannot override declared intention of parties expressed in contract document*

WORDS AND PHRASES: *"progress payment" - Building contracts - Whether includes final payment*

The applicant/plaintiff was the nominated sub-contractor to build, *inter alia*, a swimming pool for a 161-unit condominium in Seremban. The respondent/defendant had earlier entered into a main contract with the developer ("the employer") to build the condominium as the main contractor. The plaintiff completed the swimming pool but was not paid fully by the defendant, as the employer had not paid the defendant. The defendant had commenced an action against the employer. The plaintiff filed the present claim against the defendant for the unpaid sums. The sessions court allowed the plaintiff's claim and the defendant's appeal to the High Court was allowed. Hence this appeal by the plaintiff. The plaintiff submitted that pursuant to the sub-contract,

A the final payment claimed by the plaintiff was outside the "pay when paid" provision expressed in cl. 13.01 of the sub-contract, as it referred to "Progress Payment/Interim Payment" only. The defendant contended that cl. 13.01 covered final payment also.

B **Held (dismissing the appeal with costs)**
Per Low Hop Bing JCA:

(1) In ordinary parlance, "progress payment" portrays any payment according to "progress" *ie*, the forward movement of the works. "Progress payment" clearly includes a payment at any stage, from the first stage, to the second stage, culminating in the final stage *ie*, the final payment. Upon the true construction of cl. 13.01, in particular the expression "progress payment", it was sufficiently wide to include the final payment claimed by the plaintiff. The plaintiff was only entitled to payment after the defendant had been paid by the employer. (para 25)

Per Abdul Malik Ishak JCA:

(1) The effect of a "pay-when-paid" clause will be entirely a matter of construction, requiring clear and unambiguous words, and requiring careful consideration of whether, on a true construction, the clause affects the right to payment or only the time for payment. Words generally are to be understood in their plain and literal meaning subject to evidence being adduced to show that the words are to be understood in some technical or special sense. (paras 47 & 48)

(2) There was no necessity to adduce any evidence to interpret cl. 13.01. The words appearing in cl. 13.01 were rather plain and they clearly precluded the defendant from paying immediately to the plaintiff unless the defendant received payment from the employer. (para 48)

(3) In construing a written contract, the object of the court is to discover the mutual intention of the parties. The intention of the parties must be ascertained from the document itself. Thus, the parties themselves cannot give direct evidence to show that their intentions were at variance with the provisions of the contract document. The task of the court is to

construe the contractual term without any preconception as to what the parties intended. However, the principles of construction cannot be relied upon to override the declared intention of the parties unequivocally expressed in the contract document. (paras 50 & 51)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon/plaintif telah dilantik menjadi sub-kontraktor untuk membina, *inter alia*, kolam renang untuk kondominium yang mempunyai 161 unit di Seremban. Responden/defendan sebelum ini telah memasuki kontrak utama dengan pembangun ('majikan') untuk membina kondominium sebagai kontraktor utama. Plaintif telah menyelesaikan pembinaan kolam renang tersebut tetapi tidak diberi bayaran penuh oleh defendan kerana majikan belum membayar defendan. Defendan telah memulakan tindakan terhadap majikan. Plaintif memfailkan tuntutan semasa ini terhadap defendan untuk bayaran yang belum dibayar. Mahkamah Sesyen membenarkan tuntutan plaintif dan rayuan defendan kepada Mahkamah Tinggi telah dibenarkan. Oleh itu, plaintif merayu. Menurut plaintif, mengikut sub-kontrak, bayaran terakhir yang dituntut oleh plaintif adalah di luar peruntukan 'bayar bila dibayar' yang didapati di kl. 13.01 sub-kontrak, kerana ia merujuk kepada "pembayaran rentetan/pembayaran interim' sahaja. Defendan menghujah bahawa kl. 13.01 meliputi bayaran terakhir.

Diputuskan (menolak rayuan dengan kos)
Oleh Low Hop Bing HMR:

(1) Dalam bahasa biasa, "pembayaran rentetan" menggambarkan bayaran mengikut 'perkembangan' *ie*, iaitu gerakan ke hadapan kerja-kerja. "Pembayaran rentetan" jelasnya termasuk bayaran pada bila-bila tahap, dari tahap pertama, kepada tahap kedua, ke pencapaian tahap terakhir *ie*, bayaran terakhir. Mengikut pentafsiran sebenar kl. 13.01, khususnya 'pembayaran rentetan', ia adalah cukup luas untuk memasukkan bayaran terakhir yang dituntut oleh plaintif. Plaintif hanya berhak untuk menuntut bayaran selepas defendan dibayar oleh majikan.

Oleh Abdul Malik Ishak HMR:

(1) Kesan klause "bayar bila dibayar" adalah perkara tafsiran, memerlukan perkataan-perkataan yang jelas dan tidak taksa, dan memerlukan pertimbangan berteliti sama ada, pada pentafsiran yang benar, klause tersebut mempengaruhi hak kepada bayaran atau hanya masa untuk pembayaran. Perkataan-perkataan pada amnya adalah untuk pemahaman dalam maksud jelas dan harfiah bergantung kepada keterangan yang dikemukakan untuk menunjukkan yang perkataan-perkataan adalah untuk difahami dari segi teknikal atau tertentu.

(2) Tiada keperluan untuk mengemukakan keterangan untuk intepretasi kl. 13.01. Perkataan-perkataan yang muncul di kl. 13.01 adalah jelas dan secara terang menghalang defendan dari membuat bayaran kepada plaintif sehingga defendan menerima bayaran daripada majikan.

(3) Dalam mentafsirkan kontrak yang ditulis, tujuan mahkamah adalah untuk mengetahui tujuan persefahaman pihak-pihak yang terlibat. Tujuan pihak-pihak mestilah dipastikan dari dokumen itu sendiri. Oleh itu, pihak-pihak yang terlibat tidak boleh memberi keterangan terus untuk menunjukkan tujuan mereka bertentangan dengan peruntukan-peruntukan kontrak dokumen. Tugas mahkamah adalah untuk mentafsirkan terma-terma kontrakual tanpa sebarang praanggapan mengenai tujuan pihak-pihak yang terlibat. Walau bagaimanapun, prinsip-prinsip pentafsiran tidak boleh diambil untuk mengatasi tujuan yang telah diisytiharkan pihak-pihak yang telah dizahirkan dengan jelas dan nyata di dalam kontrak dokumen.

Case(s) referred to:

A Davies & Co (Shopfitters) Ltd v. William Old Ltd [1969] 67 LGR 395 ***(refd)***

Brightside Mechanical & Electrical Services Group Ltd v. Hyundai Engineering & Construction Co Ltd [1988] MLJ 500 ***(refd)***

British Movietonews Ld v. London and District Cinemas Ld [1952] AC 166 ***(refd)***

Charter Reinsurance Co Ltd v. Fagan [1997] AC 313 ***(refd)***

Equitable Life Assurance Society v. Hyman [2000] 3 All ER 961 ***(refd)***

Hong Kong Teakwood Works Ltd v. Shui On Construction Co Ltd [1984] HKLR 235 ***(refd)***

Hyundai Merchant Marine Co Ltd v. Gesuri Chartering Co Ltd, (The 'Peonia') [1991] 1 Lloyd's Rep 100 ***(refd)***

Iezzi Constructions Pty Ltd v. Watkins Pacific (Q) Pty Ltd [1995] 2 Qd R 350 ***(refd)***

International Fina Services AG v. Katrina Shipping Ltd and Tonen, Tanker Kabushiki Kaisha, (The 'Fina Samco') [1995] 2 Lloyd's Rep 344 ***(refd)***

Interpo Engineering Pte Ltd v. Sin Heng Construction Co Pte Ltd [1998] 1 SLR 694 ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) And Others [1998] 1 WLR 896 ***(refd)***

James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd [1970] AC 583 [1970] 1 All ER 796 ***(refd)***

K Appukuttan Panicker And Another v. S.K.R.A.K.R. Athappa Chettiar, AIR 1966 Kerala 303 ***(refd)***

L Schuler AG v. Wickman Machine Tool Sales Ltd [1974] AC 235 HL ***(refd)***

Pagnan SpA v. Tradax Ocean Transportation SA [1987] 1 All ER 81 ***(refd)***

Pernas Otis Elevator Co Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Anor [2004] 5 CLJ 34 HC ***(refd)***

Pioneer Shipping Ltd And Others v. BTP Tioxide Ltd [1982] AC 724 ***(refd)***

Prenn v. Simmonds [1971] 1 WLR 1381 ***(refd)***

Robertson And Thomson v. French [1803] 102 ER East, 1-6 ***(refd)***

Ryoden (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd [1992] 1 MLJ 33 HC ***(refd)***

Schindler Lifts (Hong Kong) Ltd v. Shui On Construction Co Ltd 29 BLR 98 ***(refd)***

Slim and Others v. Daily Telegraph Ltd and Others [1968] 2 QB 157 ***(refd)***

Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd [1992] 2 NZLR 473 ***(refd)***

Society of Lloyd's v. Robinson [1999] 1 WLR 756 HL ***(refd)***

Static Control Components (Europe) Ltd v. Egan [2004] 2 Lloyd's Rep 429 ***(refd)***

The Union of India v. Kishorilal Gupta and Bros, AIR 1959 Supreme Court 1362 ***(refd)***

William Abbott and Others v. Eliza Middleton and Others, George HM Ricketts v. GWW Carpenter [1858] 11 ER House of Lords 7-11 ***(refd)***

Zoan v. Rouamba [2000] 1 WLR 1509 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14

For the plaintiff/appellant - Oh Teik Keng; M/s Oh Teik Keng & Partners

For the defendant/respondent - T Shanmugaraj; M/s Ngae, Shan, Kalai & Co

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R1-12-522-2003]

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] Parties are referred to in their capacities in the Sessions Court.

[2] The Kuala Lumpur Sessions Court had allowed the plaintiff's claim with costs against the defendant.

[3] The defendant's appeal to the High Court was allowed with costs. The High Court made a further order that the judgment sum of RM271,458.29, paid by the defendant to the plaintiff, be returned to the defendant, together with interest at 8% p.a.

[4] The plaintiff has now appealed to this court.

Finding Of Facts

[5] The facts at the trial are not in dispute. The plaintiff was the nominated sub-contractor to build, *inter alia*, a swimming pool for a 161-unit condominium in Seremban. The defendant had earlier entered into a main contract with the developer ("the employer"), Ng Chee Yew Sdn Bhd, to build the condominium as the main contractor. The plaintiff had completed the swimming pool, but has not been paid fully by the defendant, as the employer had not paid the defendant. Pursuant to the main contract, the defendant has commenced an action against the employer to recover the sum of RM1,749,762.08. Under the sub-contract, the plaintiff had filed the claim in the Sessions Court for the unpaid sum of RM212,989.25.

Reliance On Main Contract

[6] In the instant appeal, the plaintiff's learned counsel Mr Oh Teik Keng cited *Ryoden (M) Sdn Bhd v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd* [1992] 1 MLJ 33 HC, and argued that the defendant is not entitled to rely on the main contract in order to defer the defendant's liability to pay the plaintiff.

[7] Learned counsel Mr T. Shanmugaraj contended that the defendant did not attempt to rely on the main contract.

[8] In our view, the defendant's stand has rendered *Royden*, *supra*, irrelevant.

[9] Be that as it may, we observe that in *Ryoden (M) Sdn Bhd, supra*, the defendant was employed by the employer as the main contractor for the construction of a project, Raintree Terrace. The defendant and the plaintiff entered into two sub-contracts to supply, *inter alia*, air-conditioning and ventilation systems. Clause 2 thereof required the plaintiff to observe all the provisions of the main contract only so far as they are related and applicable to the sub-contract works and were not repugnant to or inconsistent with the express provisions of the sub-contract. The plaintiff alleged that the defendant had failed or refused to pay the plaintiff certain progress payments notwithstanding that such payments were duly certified by the authorized architect of the project. The plaintiff instituted the action against the defendant. The learned registrar entered summary judgment against the defendant under O. 14 of the Rules of the High Court 1980. On appeal to judge in chambers, the defendant argued that the defendant was not indebted to the plaintiff on the grounds, *inter alia*, that cl. 27(a)(vii) of the main contract specially provided that payment would be made only within 14 days after the receipt by the defendant from the employer of the amounts stated in the architect's certificate. Clause 27(a)(vii), which is a "pay when paid" clause, was not expressly stated in the two sub-contracts. Lim Beng Choon J (as he then was) distinguished *Brightside Mechanical & Electrical Services Group Ltd v. Hyundai Engineering & Construction Co Ltd* [1988] MLJ 500, *supra*, as the wordings used in cl. 11 in the sub-contract therein were different from cl. 11 and cl. 2 in *Ryoden*, *supra*.

[10] We must stress here that the reliance by the main contractor on the main contract, in particular cl. 27(a)(vii), in *Ryoden*, *supra*, did not help the main contractor there at all, because the "pay when paid" provision contained in cl. 27(a)(vii) was held not to be part of the sub-contract. In the circumstances, we are of the view that in any event *Ryoden*, *supra*, is of no assistance to the plaintiff.

"Pay When Paid"

[11] Next, the plaintiff submitted that pursuant to the sub-contract, the final payment claimed by the plaintiff is outside the "pay when paid" provision expressed in cl. 13.01 of the sub-contract, as it refers to "progress payment/interim payment" only and so it is inapplicable. (A reference hereinafter to a clause is a reference to that clause in the sub-contract).

[12] It was contended for the defendant that the final payment claimed by the plaintiff is only due and payable upon receipt of such payment by the defendant from the employer, because the expression "progress payment" in cl. 13.01 covers final payment.

[13] The learned appeal High Court judge rejected the plaintiff's contention and held that the defendant did not incur any liability to pay the plaintiff until the defendant had actually received payment from the employer.

[14] The divergent submissions of the respective learned counsel, and the decision of the learned judge, revolve around a common denominator ie, the construction of cl. 13.01. The question for determination is: Upon the true construction of cl. 13.01, particularly the expression "progress payment", does the final payment claimed by the plaintiff come within the ambit of "progress payment"?

[15] At this juncture, it is appropriate for us to refer to cl. 13.01 which reads as follows:

> 13.00 Progress Payment/Interim Payment
>
> 13.01 Notwithstanding the provision of Clause 27 pertaining to nominated sub-contractor and the payment for works executed, it is hereby agreed that in the event of any interim certificate which includes, for nominated sub-contract works, the payment in respect of any work, 75% material or goods comprised in the sub-contract shall be made to the sub-contractor within 14 days after receipt by the Main Contractor of payment certified as due in the Interim Certificate from the Client ie, Messrs Ng Chee Yee Sdn. Bhd.

[16] Clause 13.01 (or a clause corresponding thereto) is popularly known as the "pay when paid" or "back to back" clause. It deserves detailed discussion. We shall look at Hong Kong, Singapore and Malaysian judgments.

[17] In Hong Kong, cl. 11(b) of the "Green Form" sets out the "pay when paid" provision in the following words:

> Within five days of the receipt by the Contractor of the sum included in any certificate of the Architect, the Contractor shall notify and pay to the Subcontractor the total value certified therein in respect of the Subcontractor works less certain agreed deduction.

[18] In the article entitled "Sub-Contractors Under Threat: A Personal View" published in "The International Construction Law Review" vol. 5, January-October 1988, Mr. Robert Jewkes viewed a similar "pay when paid" clause in Hong Kong as a "provision to protect the main contractor against the risk of insolvency of the employer." He considered it as a fair and sensible provision.

[19] The word "receipt" in cl. 11(b) has been construed by Hong Kong Courts to mean "actual payment, receipt of money": per Hunter J in *Hong Kong Teakwood Works Ltd v. Shui On Construction Co. Ltd* [1984] HKLR 235 Hong Kong HC; and approved by the Hong Kong Court of Appeal in *Schindler Lifts (Hong Kong) Ltd v. Shui On Construction Co. Ltd* 29 BLR 98.

[20] In Singapore, the "pay when paid" clause in the sub-contract substantially incorporates cl. 11(b) of the Hong Kong model. In construing such a clause in *Brightside Mechanical & Electrical Services Group Ltd*, *supra*, Thean J (of the Singapore HC), held at p. 504 that, *prima facie*, cl. 11(b) contemplated the actual receipt by the main contractor of the sum included in the certificate and that until the main contractor received from the owner the sum claimed by the sub-contractor, the main contractor was not obliged to pay it to the sub-contractor.

[21] A similar "pay when paid" clause was included as cl. 7(ii) of the sub-contract in *Interpo Engineering Pte Ltd v. Sin Heng Construction Co Pte Ltd* [1998] 1 SLR 694. Choo Han Teck JC (of the Singapore HC) held that the "pay when paid" clause was reasonably straightforward and unambiguous, and that the plaintiff (sub-contractor) was not entitled to any progress payment unless the same was received by the defendant ("main contractor") from the employer.

[22] In Malaysia, the "pay when paid" clause came up for judicial consideration by our High Court in *Pernas Otis Elevator Co. Sdn. Bhd. v. Syarikat Pembenaan Yeoh Tiong Lay Sdn Bhd & Anor* [2004] 5 CLJ 34. There, the plaintiff was the sub-contractor in a project involving the construction of a hotel. The defendants were the main contractors. The plaintiff has completed the works as stipulated under the sub-contract. However, the employer complained that the lifts installed by the plaintiff had caused excessive harmonic distortions. The terms of the sub-contract include, *inter alia* cl. 2.3(g) (the "pay when paid" clause) in the following words:

A 2.0 Terms of payment

2.1 ...

2.2 ...

B 2.3 ...

(a) ...

(b) ...

C (c) ...

(d) ...

(e) ...

(f) ... and

D (g) payment in respect of any work, material or goods comprised in the sub-contract shall be made within seven (7) days after receipt by the main contractor from the employer.

E **[23]** Pursuant to cl. 2.3(g), the defendants denied the liability to pay the plaintiff's claim, as they have not received payment of the sum from the employer.

[24] Ramly Ali J (now JCA), after referring to the above article, F and the judgments of the Hong Kong and Singapore courts, held that the defendants' liability or obligation to pay the plaintiff arose only upon the defendant having received the payment from the employer.

G **[25]** Reverting to the instant appeal, in ordinary parlance, "progress payment" portrays any payment according to "progress" ie the forward movement of the works. "Progress payment" clearly includes a payment at any stage, from the first stage, to the second stage, culminating in the final stage ie, the final payment. H Upon the true construction of cl. 13.01, in particular the expression "progress payment", we are of the view that it is sufficiently wide to include the final payment claimed by the plaintiff, in which case, the plaintiff is only entitled to payment after the defendant has been paid by the employer. Hence, we are I unable to sustain the submission presented for the plaintiff.

Conclusion

[26] On the foregoing grounds, the answer to the above question is in the affirmative. We hold that the decision of the High Court is correct. We affirm it accordingly. This appeal is dismissed with costs of RM3,000 to the defendant. Deposit to the defendant on account of the said costs.

[27] By way of postscript, we find it necessary to say that all is not lost for the plaintiff. The claim by the plaintiff, being premature, may be established by fulfilling the condition stated in cl. 13.01. The payment for the plaintiff's claim is not immediate but is deferred. The plaintiff has to wait and contend with the "pay when paid" provision in cl. 13.01. Of course, we cannot express any opinion in relation to the plaintiff's claim when it eventually matures, as that claim, if any, is not before us in the instant appeal.

[28] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[29] This is my supporting judgment to that of my learned brother Low Hop Bing, JCA. The facts have been sufficiently set out by his Lordship in his well-written judgment. I am therefore spared the task of regurgitating them here. However, I shall only state the facts relevant to the issues in this appeal.

[30] Just like my learned brother Low Hop Bing, JCA the parties herein would be referred to as they were referred to in the Sessions Court. Thus, Asiapools (M) Sdn Bhd (No. Sykt 26610-U) will be referred to as the plaintiff while IJM Construction Sdn Bhd (No. Sykt 104131-A) will be referred to as the defendant.

[31] Ng Chee Yew Sdn Bhd is the developer of a project known as the "Proposed 161 Units of Condominium on PT 3844 HSD 89511 at Taman Bukit Kaya, Jalan Labu, Seremban, Negeri Sembilan" (hereinafter referred to as "the project"). The developer is referred to hereinafter as "the employer."

[32] The defendant was appointed by the employer as the main contractor for the project which included the swimming pool works (hereinafter referred to as the "sub-contract works"). The

main contract between the employer and the defendant as the main contractor was dated 27 June 1996 and it was according to the PAM Form.

[33] The employer nominated the plaintiff as the nominated sub-contractor to execute and complete the sub-contract works.

[34] And by way of a letter of acceptance dated 13 March 1996 together with a formal sub-contract dated 27 July 1996, the defendant appointed the plaintiff as their nominated sub-contractor for the sub-contract works. The sub-contract that was used was the PAM Form for a nominated sub-contractor.

[35] The sub-contract works were successfully completed by the plaintiff. Unfortunately, the plaintiff has not been paid fully by the defendant because the employer had not paid the defendant. Without the money coming from the employer to the defendant, the defendant was not in a position to pay the plaintiff.

[36] On the strength of the main contract, the defendant sued the employer to recover the sum of RM1,749,762.08.

[37] And by virtue of the sub-contract, the plaintiff filed a claim in the Sessions Court against the defendant for the recovery of the unpaid sum to the tune of RM212,989.25.

[38] The Sessions Court in Kuala Lumpur gave judgment to the plaintiff with costs against the defendant. The High Court allowed the defendant's appeal with costs. The High Court also made an order that the judgment sum of RM271,458.29 paid by the defendant to the plaintiff be returned to the defendant together with interest at 8% per annum. Aggrieved by the decision of the High Court, the plaintiff now appeals to this court.

[39] Is the defendant obliged to pay the plaintiff if the defendant has not received the payment from the employer? That would be the crucial question to pose. The answer is not far to seek. It is found in cl. 13.01 in the letter of acceptance dated 13 March 1996 from the defendant to the plaintiff as seen at p. 379 of the appeal record. It is worded as follows:

> 13.00 Progress Payment/Interim Payment
>
> 13.01 Notwithstanding the provision of Clause 27 pertaining to nominated sub-contractors and the payment for works executed, it is hereby agreed that in the event of any

> interim certificate which includes for nominated sub-contract works, the payment in respect of any work, 75% materials or goods comprised in the Sub-Contract shall be made to the Sub-Contractor within 14 days after receipt by the Main Contractor of payment certified as due in the Interim Certificate from the Client ie, Messrs Ng Chee Yew Sdn Bhd.

[40] There is only one meaning to cl. 13.01. It is rather clear. That payment for the sub-contract works can only be made upon receipt of such payment by the defendant from the employer.

[41] It must be borne in mind that the meaning of the contract, once interpreted by the court, does not change. Lord Diplock LJ explained it better in *Slim and Others v. Daily Telegraph Ltd. and Others* [1968] 2 QB 157, CA at pp. 171 to 172:

> Everyone outside a court of law recognises that words are imprecise instruments for communicating the thoughts of one man to another. The same words may be understood by one man in a different meaning from that in which they are understood by another and both meanings may be different from that which the author of the words intended to convey. But the notion that the same words should bear different meanings to different men and that more than one meaning should be 'right' conflicts with the whole training of a lawyer. Words are the tools of his trade. He uses them to define legal rights and duties. They do not achieve that purpose unless there can be attributed to them a single meaning as the 'right' meaning. And so the argument between lawyers as to the meaning of words starts with the unexpressed major premise that any particular combination of words has one meaning which is not necessarily the same as that intended by him who published them or understood by any of those who read them but is capable of ascertainment as being the 'right' meaning by the adjudicator to whom the law confides the responsibility of determining it.

[42] Arden LJ in *Static Control Components (Europe) Ltd v. Egan* [2004] 2 Lloyd's Rep 429, at p. 435, aptly said:

> ... there are not two possible constructions in any given situation, namely a purely lingustic one and one in the light of the factual background, but only one, the true interpretation. This is because the object of interpretation is to discover the meaning of the provision in question in its context.

[43] How would a reasonable reader construe cl. 13.01 as reproduced above? The approach to be adopted would be like what Lord Hoffmann advised in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) and Others* [1998] 1 WLR 896, HL, at p. 912:

> Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

[44] Lord Steyn in *Equitable Life Assurance Society v. Hyman* [2000] 3 All ER 961, at p. 970 explained it further in his own words:

> The purpose of interpretation is to assign to the language of the text the most appropriate meaning which the words can legitimately bear.

[45] Of course, the purpose of interpretation is to ascertain the intention of the contracting parties. And this was the approach of Lord Diplock in *Pioneer Shipping Ltd. And Others v. B.T.P. Tioxide Ltd* [1982] AC 724, HL, at p. 736:

> The object sought to be achieved in construing any commercial contract is to ascertain what were the mutual intentions of the parties as to the legal obligations each assumed by the contractual words in which they (or brokers acting on their behalf) chose to express them;.

[46] Properly construed cl. 13.00 may be said to be a "pay-when-paid" clause or "back-to-back" clause. A classic example of a "pay-when-paid" clause can be seen in the case of *A Davies & Co (Shopfitters) Ltd v. William Old Ltd.* [1969] 67 LGR 395, a Queen's Bench Division case. In that case the defendant was the main contractor for the erection of a new store on JCT 63 terms, which provided for certain work to be sub-contracted to a sub-contractor nominated by the architect. The architect obtained a tender for this work from the plaintiff and instructed the defendant to accept it. The defendant sent an order to the plaintiff on their standard printed form, which contained on its reverse, printed conditions which included a "pay-when-paid" clause. The plaintiff wrote thanking the defendant for the order and carried out the work. The employer became insolvent before having paid for all the work. It was held that the contract

between the plaintiff and the defendant was on the basis of the defendant's printed conditions, which the plaintiff had accepted. The defendant was only liable to pay for the work in so far as he had himself been paid by the employer.

[47] I am of the view that the effect of a "pay-when-paid" clause will be entirely a matter of construction, requiring clear and unambiguous words, and requiring careful consideration of whether, on a true construction, the clause affects the right to payment or only the time for payment (see the Australian case of *Iezzi Constructions Pty Ltd v. Watkins Pacific (Q) Pty Ltd* [1995] 2 Qd R 350; and the New Zealand case of *Smith & Smith Glass Ltd v. Winstone Architectural Cladding Systems Ltd* [1992] 2 NZLR 473).

[48] It is a correct assertion to say that words generally are to be understood in their plain and literal meaning. This does not mean that one must refer to the dictionary in order to obtain the dictionary sense of the word. Rather the words must generally be understood (*Robertson And Thomson v. French* [1803] 102 ER East, 1-6 at p. 779, 781) to mean one thing and not another. This is, of course, always subject to admissible evidence being adduced to show that the words are to be understood in some technical or special sense. Here, there is no necessity to adduce any evidence to interpret cl. 13.01. The words appearing in cl. 13.01 that "the payment in respect of any work, ... shall be made to the sub-contractor within 14 days after receipt by the main contractor of payment certified as due in the interim certificate from the client ie, Messrs Ng Chee Yee Sdn Bhd" are rather plain and they clearly preclude the defendant from paying immediately to the plaintiff unless the defendant receives payment from the employer.

[49] Such an interpretation would not result in absurdity (*William Abbott and Others v. Eliza Middleton and Others, George HM Ricketts v. GWW Carpenter* [1858] 11 ER House of Lords 7-11, at p. 67; and *Investors Compensation Scheme Ltd v. West Bromwich Building Society, Same v. Hopkin & Sons (A Firm) And Others (supra)*) nor would it be inconsistent with the rest of the PAM Form for a nominated sub-contractor. I would certainly refrain from concluding that the parties herein intended a construction that would lead to an unreasonable result (*L Schuler AG v. Wickman Machine Tool Sales Ltd* [1974] AC 235, HL, at p. 251). I am mindful of the speech of Lord Steyn in *Society of Lloyd's v. Robinson* [1999] 1 WLR 756, HL particularly at p. 763 that "in

A the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction." I also heed the advice of Lord Mustill in *Charter Reinsurance Co Ltd v. Fagan* [1997] AC 313, HL particularly at p. 388, where his Lordship said that "to force
B upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made."

[50] In construing a written contract, like the present case at
C hand, the professed object of the court is quite simple. It is to discover the mutual intention of the parties (*Pioneer Shipping Ltd. And Others v. B.T.P. Tioxide Ltd. (supra)*; and *International Fina Services A.G. v. Katrina Shipping Ltd. and Tonen, Tanker Kabushiki Kaisha, (The 'Fina Samco')* [1995] 2 Lloyd's Rep. 344, CA, at
D p. 350). And the intention of the parties must be ascertained from the document itself. Thus, the parties themselves cannot give direct evidence to show that their intentions were at variance with the provisions of the contract document (*Prenn v. Simmonds* [1971] 1 WLR 1381, HL, at p. 1385; *Hyundai Merchant Marine Co. Ltd.*
E *v. Gesuri Chartering Co. Ltd., (The 'Peonia')* [1991] 1 Lloyd's Rep. 100, CA, at p. 102; *British Movietonews Ld. v. London And District Cinemas Ld.* [1952] AC 166, HL; and *Zoan v. Rouamba* [2000] 1 WLR 1509, CA, at p. 1523). The task of the court is quite simple. It is to construe the contractual term without any
F preconception as to what the parties intended (*Pagnan SpA v. Tradax Ocean Transportation SA* [1987] 1 All ER 81, at p. 88, which was affirmed on appeal *vide* [1987] 3 All ER 565).

[51] When the minds of the parties are expressed in an
G unambiguous manner, the principles of construction which are at best only a guide in the search for the intention of the parties cannot be relied upon to override the declared intention of the parties unequivocally expressed in the contract document (*K. Appukuttan Panicker and Another v. S.K.R.A.K.R. Athappa*
H *Chettiar*, AIR 1966 Kerala 303). And where the intention of the parties is clear from the language which they have used in the agreement, like the present case at hand, and the words contained therein are clear and unambiguous, there is no scope for drawing upon hypothetical considerations or supposed intentions of the

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parties (*The Union of India v. Kishorilal Gupta and Bros*, AIR 1959 Supreme Court 1362). According to the case of *James Miller and Partners Ltd v. Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, HL, [1970] 1 All ER 796, HL, once a contract has been considered it must be interpreted without reference to pre-contractual negotiations or subsequent dealing between the parties. The reason for this approach is easily discernible. It is purely to preserve the certainty given by written contracts.

[52] In order to give cl. 13.01 of the letter of acceptance an intelligible meaning, it must be construed that the defendant is obliged to pay the plaintiff once the defendant has been paid by the employer. This is my judgment and I so hold accordingly.

[53] For these reasons, I would now make those orders as made by my learned brother Low Hop Bing JCA. The decision of the High Court cannot be faulted.